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IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 1941

No. 222

FRANK A. ASH, ET AL., *Petitioners*,

v.

BARNSDALL OIL COMPANY, ET AL., *Respondents*

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals, for the Fifth Circuit

AND BRIEF IN SUPPORT THEREOF

Of Counsel:
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Houston, Texas,
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ALPHA LAW BRIEF CO., HOUSTON

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The granting of the writ of certiorari by the District Court of Nueces County, Texas, suspended the power and jurisdiction of the County Court of Nueces County, Texas, to proceed with a general administration of Schatzel's estate, or to sell lands belonging to said estate, during the pendency of the contest over his will pending in the District Court . . 15

While the contest over the probating of the will of Schatzel was pending on appeal in the District Court, the County Court of Nueces County was without power to order its temporary administrator to sell the lands of said estate, and such sale by the temporary administrator was void and passed no title 19

The judgment of the County Court of Nueces County, Texas, probating the will of Schatzel was vacated, set aside and annulled by the writ of certiorari issued by the District Court of that County, and said entire proceeding was thereby removed to the District Court for trial de novo; the burden resting

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on Zacharie, the proponent of said will, to prosecute the case to judgment probating the will in the District Court. That was not done, but the case was dismissed by the District Court in 1868. Such dismissal ended the case and left the will unprobated . . . 27

All of the judgments and orders entered by, and proceedings had before, Cornelius Cahill, Chief Justice and Judge of the Probate Court of Nueces County, Texas, in the matter of the estate of John P. Schatzel, deceased, were coram non judice and void, because the said Cornelius Cahill was a debtor of said estate and "interested" therein and thereby disqualified to act as judge in any proceeding incident to said estate or its administration 30

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IN THE

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No.....

FRANK A. ASH, ET AL., *Petitioners,*

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BARNSDALL OIL COMPANY, ET AL., *Respondents*

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals, for the Fifth Circuit

---

TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:

The petition of Frank A. Ash, John F. Ash, Samuel G. Ash, Elsie Barford and husband Lewis C. Barford, Anna Katharine Dorothea Becker, nee Schmitt, widow, Mrs. Lilli Elizabeth Behrens, widow, Hedwig A. Bender and husband J. Phillip Bender, Dorothy R. Bonhall and husband Leroy H. Bonhall, Anna Maria Cusnich and husband Friedrich Cusnich, Eduard Capito, Georg Capito I, Johanna Meth Capito, Wilhelm Capito, Mrs. Kenneth Delaplane, widow, Katharine Emig and husband Peter Emig, Katharina Foebel, nee Lukas,

widow, Julia Fink and husband H. D. Fink, Howard H. Flurer, Verne G. Gram and husband Fred S. Gram, Catherine R. Haden and husband Edwin W. Haden, Elizabeth H. Hill and husband Howard R. Hill, Arthur Hillman, Christine Hillman, Anna Hougendobler, widow, Berta Hazel Johnson and husband George E. Johnson, Mrs. John F. (Rosetta) von Kaenel, widow, Julia Schoenberger Koehler and husband David Koehler, Anna W. Kraemer and husband John L. Kraemer, Zetta Bock and husband Adolf Bock, Mary Krock and husband Henry G. Krock, Wilhelm Josef Lange, Millie Larsen, widow, Margaretha Lauber and husband Friedrich Lauber, Katharine Liebegott, nee Lukas, widow, George Lukas, Helma Lukas, feme sole, Johann Lukas, Wilhelmine Katharine Lukas, feme sole, Mrs. Delia Miller, widow, Gustav Miller, Harriet L. Miller and husband John Edward Miller, Eleanor Schatzel McGuire, widow, Rose May Poling and husband S. H. Poling, Joe Raycraft, Julia M. Rupright, Albert E. Schatzel, Birdella P. Schatzel, Frank Schatzel, George P. Schatzel, Martha Schatzel, widow, Joe J. Schatzel, Juliet L. Shaper and husband Joel L. Shaper, Dorothea Johanna Schneider, widow, Alice Carroll Schilling, feme sole, Joseph Phillip Schmitt, George N. Schoenberger and wife Otta E. Schoenberger, Louis Schoenberger, Michael F. Schoenberger, William H. Schoenberger, Fred S. Schmunk, John Schmunk, Jr., William F. Schmunk, Mrs. Pearl Schwabel and husband Charles Schwabel, August N. Scritsmier, Frank S. Scritsmier, Harry E. Scritsmier, Justus H. Scritsmier, Kate A. Scritsmier, feme sole, Alma G. Stubbeman, feme sole, Earl C. Stubbeman, Joe H. Stubbeman, Wm. G. Stubbeman, Catherine Sweitzer and husband Charles Sweitzer, Albert Stauch, Mrs. Elvira S. Raven, widow, Anna E. Turkington and husband William A. Turkington, Ray Van Loon, Catherine S. Vogel, widow, Sophie Mag Wezh nee Capito, widow, Wade Byron Winslett, and G. H. Nagel (who were appellants in the Cir-

cuit Court of Appeals), respectfully present this Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review the decision and decree made and entered in said Circuit Court of Appeals on March 3, 1941 (Tr. 764-70). Petition for rehearing was duly and timely filed (Tr. 771), and denied by the Court on March 29, 1941 (Tr. 796-9). The opinion of the Circuit Court of Appeals will be found in Vol. 118, p. 699, FEDERAL REPORTER, 2nd series.

Summary Statement of Matter Involved

This suit was filed by Mary Zacharie Brock, and others, all nonresidents of Texas, against Barnsdall Oil Company, a Delaware corporation doing business in Texas; Flour Bluff Oil Corporation, Humble Oil & Refining Company and Humble Pipe Line Company, Texas corporations, for title and possession of a tract of land called the Flour Bluff peninsula, containing approximately seven thousand acres, a part of El Rincon de Corpus Christi grant in Nueces County, Texas, and for damages in the sum of four million dollars, the value of oil produced from said land by defendants (Tr. 34, 87).

At his death on October 23, 1854, John Peter Schatzel, a resident of Nueces County, Texas, owned said land. All parties to this suit claim under him. Plaintiffs, who are descendants of James W. Zacharie, claim under an alleged will of Schatzel which devised the land to said Zacharie (Tr. 41 to 60).

Petitioners, Frank A. Ash, and others above named, heirs of said Schatzel, intervened in the suit, claiming that the alleged will of Schatzel was not probated, and that the temporary administrator's sale, through which defendants deraign title, was void for want of jurisdiction in the County Court of Nueces County, Texas, to order sale of said land; and asserting title to said land as heirs of said Schatzel (Tr. 105, 117).

Defendants claim the land under a sale made by a temporary administrator, under order of the County Court of Nueces County, Texas, made while a contest was pending between Zacharie and the heirs of said Schatzel over the probating of the alleged will of Schatzel.

J. O. Phillips, and others (Tr. 220), Robertson Securities and Investment Company (Tr. 275), Alexander Duessen (Tr. 281), and Marjorie McKinley, and others (Tr. 284), intervened in the suit, as defendants, claiming royalty interests and mineral interests in the same land, under the same temporary administrator's sale. They and the original defendants made common defense against the plaintiffs and the interveners, Ash, et al.

The County Court of Nueces County, Texas, with Cornelius Cahill as Chief Justice, entered an order probating an alleged lost will of Schatzel; the heirs of Schatzel contesting. The District Court of Nueces County, by writ of certiorari issued on application filed by said contestants, removed said proceedings to the said District Court for trial de novo, as provided by the statutes of Texas. Samuel W. Fullerton, whom the County Court had appointed executor of said will, upon issuance of said certiorari, filed his petition in the said County Court that the decree establishing the will of said Schatzel having been superseded by certiorari to the District Court, prayed that he be appointed administrator pro tem of said estate during the pendency of the controversy; and said Cornelius Cahill, Chief Justice, entered an order appointing said Fullerton administrator pro tem of said estate, with limited powers to take charge of and preserve said estate pending said controversy. After the jurisdiction of the District Court over said estate had attached through said certiorari, and that of the County Court had been superseded or suspended thereby, the said County Court undertook to sell, and did order said Fullerton, administrator pro tem, to sell the lands belonging to said estate, including that involved

in this suit. The respondents claim under this pretended sale, made under orders of the County Court at a time when its jurisdiction to administer said estate had ceased. The statutes of Texas required that all matters brought to the District Court from the County Court, either by appeal or certiorari (concurent remedies) should be tried de novo; thus giving the District Court plenary powers over such proceedings.

The statutes of Texas required that pending a contest over probating of a will, that the Chief Justice of the County should appoint an administrator pro tem, with limited powers, to serve until the termination of the contest and the appointment and qualification of an executor or administrator with full powers. (R. C. S. TEXAS, Art. 3379.) It was under said statutes that the Chief Justice of Nueces County appointed said Fullerton administrator pro tem of said estate, after the jurisdiction of the County Court to administer said estate had been superseded by said certiorari proceeding.

On the trial of this case in the District Court of the United States for the Southern District of Texas, judgment was rendered in favor of the defendants for the land involved, and denying plaintiffs and interveners (these petitioners) all relief (Tr. 355 to 368).

The plaintiffs and interveners (these petitioners) filed appeals to the Circuit Court of Appeals for the Fifth Circuit.

While the case was pending in the Circuit Court, these petitioners dismissed their appeal as to the defendants, Barnsdall Oil Company, Flour Bluff Oil Corporation, Humble Oil & Refining Company, Humble Pipe Line Company, and J. O. Phillips (Tr._____), and Robertson Securities & Investment Company (Tr. _____).

Petitioners are entitled to judgment for the land, unless (1) the alleged will of Schatzel was probated, or (2) the sale by the temporary administrator made while the will contest was pending in the District Court of Nueces County, passed title to the purchaser at such sale.

The United States District Court held that the will was validly probated, and that the sale by the temporary administrator was valid and passed title (Tr. 362, 363, and 385).

The Circuit Court of Appeals held that the sale by the temporary administrator was valid and passed title to the land; but declined to decide the point whether the will was probated (Tr. 767), and affirmed the judgment of the District Court.

Jurisdiction

This petition for Writ of Certiorari is prosecuted by petitioners pursuant to the provisions of Sec. 240 of the JUDICIAL CODE (Title 28, Section 347, U.S.C.A.) and Rule 38 of the REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES, adopted February 13, 1939, and amended March 25, 1940, and October 21, 1940, providing for review on certiorari of decisions of the Circuit Courts of Appeal. The decision of the Circuit Court of Appeals was rendered March 3, 1941 (Tr._____); motion for rehearing duly filed was denied March 29, 1941 (Tr._____). This petition is filed June _____, 1941, within three months from date said motion for rehearing was denied.

Petitioners would further show that the Circuit Court of Appeals for the Fifth Circuit has rendered its decision herein on an important question of local law in a way which conflicts with the applicable local decisions, that is, the decisions of the Appellate Courts of the State of Texas, which are controlling on the issues. (KLAXON MFG. CO. v. ELECTRIC MFG. CO., 85 L. Ed. 971.)

Petitioners further contend that since the District Court of the United States for the Southern District of Texas held in this case that the will of Schatzel was validly probated and on such holding and conclusion rendered judgment against petitioners, the refusal of the Circuit Court of Appeals to review that holding, under proper assignments of

error urged by petitioners, and again presented in their motion for rehearing (Tr. 771-8), will deprive these petitioners of a vast quantity of land (other than that involved in this suit) owned by Schatzel at the time of his death, and which was not sold through administration proceedings on his estate; including a tract of 1500 acres called the "Rincon" (Tr. 443), and Mustang Island (Tr. 445)—because the judgment of the United States District Court, unless reversed, will operate as an estoppel against petitioners in any suit in which they are parties, involving said other lands, and prevent them from asserting their title thereto.

Houston Terminal Land Co. v. Westergren (Texas Supreme Court), 27 S.W. (2d), p. 526;
Harrison v. Bank, 224 S.W. 273;
Oklahoma v. Texas, 256 U.S. 70, 41 Sup. Ct. 420, 65 L. Ed. 831.

Therefore, such refusal will deprive petitioners of their title to such lands, without a day in court. (SAUNDERS v. SHAW, 244 U.S. 317, 61 L. Ed. 1163, 37 Sup. Ct. 638; HELIS v. WARD, 308 U.S. 365, 84 L. Ed. 327.) And is so great a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this court's power of supervision. (Sec. 5-b of Rule 38, REVISED RULES OF THE SUPREME COURT; Fourteenth Amendment to the CONSTITUTION OF THE UNITED STATES.)

Questions Presented

The following are the issues presented by this application:

(1) The Circuit Court of Appeals erred in holding that the sale made by the temporary administrator was valid and passed title to the land, because the legal effect of the writ of certiorari granted by the District Court of Nueces County to the County Court of said county, on application of the

Schatzel heirs for removal of said proceeding to the District Court, under the statute law and decisions of the Supreme Court of Texas, was to suspend the jurisdiction and power of the County Court to proceed with a general administration of said estate, or sell lands of said estate, while the matter was pending undecided in the District Court; and the sale, made under order of the County Court after said writ of certiorari with supersedeas was granted and the case removed to the District Court, was void and passed no title. The decision of the Circuit Court of Appeals conflicts with said local law of Texas.

(2) Under the Texas probate law, where judgment of the County Court probating a will was vacated and annulled by certiorari granted by the District Court under writ of supersedeas, the power of the County Court over such estate while the contest over the probating of the will was pending in the District Court, was by said statute limited to such proceedings as would preserve and care for the estate until final decision in the will contest; and an order of sale of lands belonging to the estate, made by the County Court while such contest was pending in the District Court, was void, and is subject to collateral attack. Such rule is not only by statute the law in Texas, but is the law as announced by the Supreme Court and the other Appellate Courts of Texas; and the holding of the Circuit Court of Appeals in this case is in conflict with said rule.

(3) The United States District Court held in this case that the will of Schatzel was validly probated by the County Court of Nueces County (Tr. 363); that the writ of certiorari granted by the District Court of Nueces County did not vacate or annul the judgment of the County Court; and that when the District Court dismissed the case, the judgment of the County Court probating the will was rein-

stated, revived and was placed in full force and effect as a final judgment.

Whether the dismissal by the District Court of the suit to probate the will, revived, reinstated and left in force the judgment of the County Court probating said will, or whether such dismissal was an end of the suit, and put all parties thereto out of court and left the will unprobated, are questions that have been before the Supreme Court of Texas many times, and it is the settled rule, supported by an unbroken line of decisions of the Texas Supreme Court, that where the judgment is removed from the County Court to the District Court by direct appeal or by certiorari, and the suit is then dismissed by the District Court, such dismissal puts an end to the suit. This rule is based on settled construction of Articles 471 and 1460, PASCHAL'S DIGEST OF STATUTES OF TEXAS, which requires such cases to be tried de novo in the District Court.

The above question was submitted by petitioners to the Circuit Court of Appeals, in this case by proper assignments. Said Circuit Court in its opinion, says:

> "Serious questions are raised as to whether the ultimate dismissal of the certiorari proceeding reinstated the probate of the will or left the parties out of court, and whether the bond given effected a proper supersedeas to stay probate proceedings. As to these, we make no decision," etc. (Tr. 767).

The Circuit Court of Appeals erred in refusing to consider said assignments and in refusing to decide said questions. Inasmuch as the United States District Court held that the will of Schatzel was validly probated, and that the dismissal of the suit to probate said will after the same reached the District Court by certiorari, left the judgment of the County Court in full force. The effect of the refusal of the Circuit Court of Appeals to decide said question will be to deprive

these petitioners of a vast quantity of land (other than what is involved here) which was owned by Schatzel at the time of his death, and which was not disposed of by any administration on his estate, as more particularly disclosed by the inventory in his estate which appears at pages 443 and 445 of the Transcript; because the judgment of the United States District Court, unless reversed, will operate as an estoppel against petitioners in any suit in which they are parties involving said other lands, and will prevent them from recovering such other lands; and they will be deprived of their title to said lands without a day in court, contrary to the Fourteenth Amendment to the CONSTITUTION. (HELIS v. WARD, 308 U.S. 365, 84 L. Ed., at p. 327.)

(4) The Circuit Court of Appeals erred in following the holding of the District Judge that there is a material difference between the "interest" of a County Judge who is a debtor of the estate being administered before his Court, and a County Judge who is a creditor of such estate, and in holding that the debtor relationship of C. Cahill, the County Judge who appointed the temporary administrator of Schatzel's estate, to the said estate, did not disqualify the said Cahill, nor render his acts in said estate coram non judice. Under the decisions of the Supreme Court of Texas, and the settled law in said state, such debtor relationship does disqualify (NEWCOME v. LIGHT, 58 Texas 141; GAY v. MINOT, 3 Cush. (Mass.) 352, cited with approval by the Supreme Court in NEWCOME v. LIGHT).

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

First

The sale by the temporary administrator Fullerton, acting under the assumed authority of the County Courts, at a time

when the entire probate matter of the Schatzel will was pending in the District Court of Nueces County upon removal from the County (Probate) Court of Nueces County, on certiorari application of the Schatzel heirs as contestants of the will, was void and passed no title to purchaser Robert Mott, because such removal had vested complete and exclusive jurisdiction thereof in the District Court and divested said County Court of any and all jurisdiction therein, under the statutes of Texas and the applicable decisions of the Supreme Court of Texas.

Under the laws of Texas the State Supreme Court is the highest court, and its decisions in applying such laws treat and hold the District Courts as superior in jurisdiction to the County Courts, and appeals from the County Courts to the District Courts are tried only *de novo*. And in this respect the Supreme Court of the United States follows the State Supreme Court. (KERSK LAKE, ETC., v. JOHNSON, 309 U.S. 485, 84 L. Ed. 881.)

Second

Under the probate laws of Texas, where the judgment of the County Court probating will was vacated and annulled by certiorari granted by the District Court under writ of supersedeas, the authority and jurisdiction of the County Court over such estate during the pendency of the will contest in the District Court, were by the Texas statutes and Supreme Court decisions limited to such proceedings as would preserve and protect the estate until final decision in the will contest; and an order of sale of lands of the estate, made by the County Court while such contest was pending in the District Court, was void, and subject to collateral attack. This is the Texas statute rule, and so held by the State Supreme Court.

And in this regard your petitioners invoke the jurisdiction of Your Honors under the KERSK LAKE case, *supra.*

Third

The Federal District Court held in this case that the will of Schatzel was validly probated by the County Court of Nueces County (Tr. 363); that the writ of certiorari granted by the District Court of Nueces County did not vacate or annul the judgment of the County Court; and that when the District Court dismissed the case, the judgment of the County Court probating the will was reinstated, revived and given full force and effect as a final judgment.

Whether the dismissal by the District Court of the suit to probate the will, revived, reinstated and left in force the judgment of the County Court probating the will, or whether such dismissal was an end of the suit, and put all parties thereto out of court and left the will unprobated, are questions that have been before the Supreme Court of Texas many times, and it is the settled rule, supported by an unbroken line of decisions of the Texas Supreme Court, *that where the judgment is removed from the County Court to the District Court by direct appeal or by certiorari, and the suit is then dismissed by the District Court, such dismissal puts an end to the suit.* This rule is based upon Article 471 REV. CIV. STATUTES OF TEXAS, which requires such cases to be tried *de novo.*

The foregoing question was submitted by Petitioners to the Circuit Court of Appeals, by appropriate assignments in the case, and the Court observed:

> "Serious questions are raised as to whether the ultimate dismissal of the certiorari proceeding reinstated the probate of the will or left the parties out of court, and whether the bond given effected a proper supersedeas to

stay probate proceedings. As to these, we make no decision," etc. (Tr. 767).

The Federal District Court having held the will validly probated, and the Circuit Court of Appeals having declined to pass upon such questions, it is apparent that lands owned by Schatzel, *but not affected by the sale of the administrator* —and such holdings are shown as large by the inventory (Tr. 443, 445)—may be lost to these petitioners, under estoppel, without even a day in court, unless reversed. Surely, this is not due process of law within the purview of the Fourteenth Amendment to the CONSTITUTION.

Fourth

The Probate Judge, C. Cahill of the Nueces County Court, was indebted to the Schatzel estate in a substantial sum at the time such estate was before him for administration and when he entered orders therein and appointed one Samuel W. Fullerton as temporary administrator, who made the sale hereinbefore set out.

Such indebtedness by said probate judge was in the sum of six hundred dollars and was reduced to judgment in order to collect. Within the purview of the CONSTITUTION OF TEXAS, then in effect, and the applicable decisions of the Texas Supreme Court, the said C. Cahill, as such debtor and judge, was "interested" in the cause before him, and thereby disqualified to act and his orders purporting to appoint said administrator were void. As the courts say, such orders were *coram non judice*.

Unlike the Federal District Judge, the Supreme Court of Texas says that it is immaterial whether the "interest" of the probate judge is that of *creditor* or *debtor* of the estate. (BURKS v. BENNETT, 62 Texas 277; NEWCOME v. LIGHT, 58

Texas 141, citing with approval GAY v. MINOT, 3 Cush. (Mass.) 352.

Again, may the petitioners invoke the long established decisions of the Texas courts of last resort in matters affecting titles to lands, which decisions have long been treated and held as valid laws of real property in Texas, and accordingly given the blessing of the United States Supreme Court.

WHEREFORE, your petitioners respectfully pray that Your Honors grant a Writ of Certiorari to issue to the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, in this case, commanding that Court to certify and send to this Court for review a full and complete transcript of the record and proceedings in the cause docketed there, No. 9662, styled Frank A. Ash and Mary Zacharie Brock, et al., appellants, v. Barnsdall Oil Company, et al., appellees; and that the judgments of said Circuit Court of Appeals and of the District Court be reversed and rendered in favor of your petitioners, as prayed for in the District Court and in said Circuit Court of Appeals, and as presented to that Court in the Assignments of Error and Propositions contained in the record above referred to and in their motion for rehearing.

Your petitioners pray for such other and further relief in the premises as this Honorable Court may deem just.

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